BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, Westchester County, has been reported at 180 Misc. 670, 46 N. Y. Supp. (2d) 451. The *per curiam* opinion of the Appellate Division, Second Department, of the Supreme Court of the State of New York has been reported at 267 App. Div. 281, 45 N. Y. Supp. (2d) 532. The Court of Appeals of the State of New York wrote no opinion.

ARGUMENT

POINT I

THIS COURT HAS JURISDICTION.

A situation analogous to the present one occurred in *Railroads* v. *Richmond,* 15 Wall. 3, where this Court expressly held that it had jurisdiction over the case. It appeared that a railroad company had entered into a written contract with the owners of a grain elevator near the Mississippi River at a time when there was no railroad bridge crossing the River. The contract provided that the owners of the elevator should have the handling of all "through" grain, *i.e.,* grain ferried across the River, and that the railroad company would pay them a certain price per bushel for receiving and discharging it. While this contract was in force, Congress enacted legislation which resulted in the building of a railroad bridge across the River and thereafter the railroad company found it unnecessary to use the services of the elevator. The elevator owners sued the

railroad company for breach of contract. The railroad company contended that the contract had been nullified by the later legislation. The Supreme Court of Iowa decided the case in favor of plaintiffs, and thereafter it came before this Court on writ of error to the Iowa Supreme Court. The elevator owners moved to dismiss on the ground that "the record did not show a state of facts that made any act of Congress apply to the case" (15 Wall. at 6). In denying the motion, this Court stated:

> "The defendants in error move to dismiss the writ of error on the ground that the 'record does not show a state of facts, that makes any act of Congress apply to the case.' The record does show, however, that the present plaintiffs in error claimed in the State court, that contracts made with the defendants in error had been rendered void and of no force and effect by provisions of the Constitution of the United States, and of certain acts of Congress, approved June 15, 1866, and July 25th, 1866, and also that the decision of the Supreme Court of Iowa, denied this claim. The motion to dismiss must, therefore, be Denied."* (15 Wall. at 7).

Again, in *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209, suit was brought in a State Court for breach of an express contract to repurchase certain bonds at maturity, at par and accrued interest. Defendant, a national bank, contended that the contract was *ultra vires* and void because in violation of the statute authorizing national banks to carry on a banking business. In holding for the defendant, this Court expressly stated (p. 213):

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*This Court subsequently affirmed the Supreme Court of Iowa on the merits, 19 Wall. 584.

> "* * * we have jurisdiction of the cause to review the ruling of the state court that the express contract was rendered invalid by the federal statute."

The fact that the present case differs from the foregoing in that it involves regulations issued by Federal agencies instead of statutes adopted by Congress is not a ground of distinction. Indeed, it is well established that "a valid legislative regulation, that is, one made pursuant to constitutional and statutory authority, has the same force as though prescribed in terms by statute." 1 *Von Baur, Federal Administrative Law* (1st Ed., 1942) § 492.

POINT II

THIS COURT SHOULD REVERSE THE DECISION BELOW.

We frankly recognize that at first sight the question involved *appears* to be solely one of construction of the lease, and therefore one of local law. So the State Court thought, for it denied our petition to amend its remittitur to show that a federal question had necessarily been decided by it, 112 New York Law Journal 133 (July 21, 1944).

What we ask this Court to decide, is whether there is not a far deeper and more significant Federal question *implicit* within the ostensibly local question, in that *under the guise* of construing a lease, the State Court is in effect interposing an obstruction to the full application of regulations issued under the Second War Powers Act. If the lease is construed as the Minnesota State Court construed it (and we do not think that there can be a serious conten-

tion that the two leases are in any way different), the *effect* is to give application to such regulations.

We entirely agree that there ought not to be a deliberately forced construction of the lease in order to bring the cancelation clause within the Federal regulations. But that the construction for which we contend is not a forced one, is evidenced by its adoption by the Minnesota State Court, as well as by its adoption by the Trial Court in this case.

What we sense in the decision (without opinion) by the Court of Appeals, and in the *per curiam* opinion by the Appellate Division, in this case, is the application of a distinctively *local* point of view in construing the lease. This is evidenced by the reliance placed by both the Appellate Division, Second Department in this case, and by the Appellate Division, First Department, in *Robitzek Investing Co.* v. *Colonial Beacon Oil Co.*, 265 App. ~~Div. 749~~, 40 N. Y. Supp. (2d) 819 (cited with approval by the Appellate Division in our case), upon local zoning laws as having been the objective of the parties in adopting the clause to be construed.

The case might be put in this way. Any construction of a written contract requires the Court to approach the contract from a background of the law to be applied to the construction. In this case, one discerns an approach by the New York State Appellate Courts to this problem of construction as made primarily with State laws in mind,—hence the adoption of the local zoning regulating conception as decisive.

We suggest that the decision calls for correction because it overlooks the controlling importance of the Federal question arising out of the exercise of the war powers. If one

approaches this paragraph of the lease, bearing fully in mind that the war situation, and the Federal legislation which recognizes it, constitute the governing background of policy and law, then we submit that one must reach the result reached by the Minnesota Appellate Court and not that which was reached by the New York Appellate Courts. Read fairly and objectively, in the light of such a background, it is really impossible to say that this lease did not contain appropriate provision to call into play the privileges accorded *in the national interest* by regulations under the Second War Powers Act.

Respectfully yours,

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August 4, 1944.